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No. _____

IN THE

Supreme Court of the United States

AT&T CORP.,
Petitioner,

v.

IOWA UTILITIES BOARD, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *AT&T Corp.* v. *Iowa Utilities Board*, 525 U.S. 366 (1999), the Court reversed the Eighth Circuit decision that had invalidated the FCC regulations which implement the landmark Telecommunications Act of 1996. The Court held that Congress granted the FCC authority to adopt regulations to carry out all the provisions of the Act, which the Court held to be pervasively "ambiguous" and in need of administrative interpretation. However, on remand, the Eighth Circuit has again invalidated rules that were previously before the Court, as well as closely related FCC rules. Four of these holdings possess critical importance. The questions presented are:

1. Whether the Eighth Circuit correctly held that it violated the "plain meaning of the Act" for the FCC to require that the determination of the "cost" that an incumbent LEC incurs in "providing [an] interconnection or network element" be based on the efficient cost of replacing LEC facilities?

2. Whether the Eighth Circuit correctly held that the FCC had "frustrat[ed] the congressional policy" by prohibiting rural telephone companies from obtaining exemptions from the Act's requirements unless they prove that compliance would result in economic burdens *other* than the lost revenue that result from efficient competitive entry and that they satisfy the Act's other criteria?

3. Whether the Eighth Circuit correctly concluded that the FCC violated the "plain meaning of the statute" when it concluded that the costs that LECs "will avoid" when offering wholesale services for resale are their retail and other costs that "reasonably can be avoided"?

4. Whether the Eighth Circuit correctly held, in direct conflict with the Ninth Circuit, that an FCC rule requiring incumbent LECs to combine network elements on request violates "the plain language of the statute"?

LIST OF PARTIES AND AFFILIATES

The parties to the proceedings in the Eighth Circuit are listed in App. A, 1a, and App. D, 222a-224a.

Pursuant to Supreme Court Rule 29.6, petitioner states as follows: AT&T provides telecommunications, cable, and other services. AT&T has no parent company. No publicly held company owns more than 10 percent of AT&T's stock.

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The opinion of the Eighth Circuit is reported at 219 F.3d 744 (App. 1a-38a). The FCC's *First Report and Order* in its local competition rulemaking is reported at 11 FCC Rcd. 15499 (1996). The relevant portions of that order are reproduced in the appendix (App. 39a-202a).

JURISDICTION

The decision of the Eighth Circuit was entered on July 18, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved in this case are sections 201(b), 251, and 252 of the Communications Act, 47 U.S.C. §§ 201(b), 251, 252. They are reproduced in App. 203a-221a.

STATEMENT OF THE CASE

This is the second time that this Court has been asked to review a decision of the Eighth Circuit that invalidated FCC regulations that implement the landmark provisions of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). These provisions undertook to introduce competition "as quickly as possible" into the local monopoly telephone markets by authorizing new local carriers to enter the local market in any or all of three different ways.[1] Each requires some "shared" use of facilities of the incumbent local exchange carrier monopolists ("LECs" or "ILECs") that cannot readily be duplicated.

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[1] H.R. Rep. No. 104-204, at 89 (1995); *see also* Joint Explanatory Statement of the Comm. of Conference, H.R. Rep. No. 104-458, at 113 (1996); S. Rep. No. 104-23, at 1 (1995).

In 1997, the Eighth Circuit invalidated most of the critical rules that the FCC adopted to implement this Act. Because it held that the FCC lacked "jurisdiction" over most local issues, the Eighth Circuit vacated the FCC rules that determine (1) the prices that LECs can charge for the "shared" portions of their networks and (2) whether and when rural LECs can be exempted from some or all of the Act's requirements. In addition, the Eighth Circuit treated the FCC's jurisdiction over the remaining provisions of the Act as confined to the adoption of narrow interpretive rules, and the Eighth Circuit vacated an FCC rule that requires LECs to provide network facilities in combined form on the ground that it violated the plain terms of § 251(c)(3) of the Act.

Because of the national importance of these rules, this Court granted certiorari, and it reversed the Eighth Circuit. *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366 (1999). The Court held that § 201(b) of the Act gives the FCC jurisdiction to adopt rules that "carry out" all the Act's local competition provisions. *Id.* at 377-78. The Court further rejected the Eighth Circuit's interpretation of § 251(c)(3) and expressly reinstated one of the specific substantive rules (47 C.F.R. § 51.315(b)) that the Eighth Circuit had invalidated. *Id.* at 393-95.

On remand, the Eighth Circuit invalidated on the merits the same pricing and "rural exemption" rules that it had previously held to be outside the FCC's jurisdiction. In addition, despite the Court's holding that the FCC has broad rulemaking authority, the Eighth Circuit refused to reinstate any of the other rules that it previously invalidated on the merits, including network element combination rules that are closely related to the rule that this Court specifically reinstated. In each instance, the Eighth Circuit held that the rules either violated the "plain meaning of the Act" or the perceived "policy underlying" it.

Review of the Eighth Circuit's latest holdings is, if anything, a matter of greater national importance than was

review of the earlier ones. The Eighth Circuit's earlier jurisdictional holdings left the interpretation of the Act to state commission and federal district court proceedings, and they, with rare exceptions, independently adopted the same rules as had the FCC. By invalidating those rules now – nearly five years after the 1996 Act's enactment – the Eighth Circuit has rendered a decision that conflicts with those of other courts of appeals and that destroyed an extraordinary national consensus on fundamental issues governing whether and how this legislation is to be implemented.

Further, each of the Eighth Circuit's holdings is erroneous. Each rests on an interpretation of statutory provisions that is inconsistent with their terms, structure, and purposes and that utterly fails to afford the FCC the deference to which its choices are entitled under *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

1. Historically, all telephone services in the United States were provided by franchised local monopolists, the incumbent LECs. The LECs were allowed to construct and operate lines (called "local loops") that connect each home and business in their franchised territories to switches and other facilities that allow each telephone in the area to place calls to, and receive calls from, every other telephone. See *AT&T* v. *Iowa Utils. Bd.*, 525 U.S. at 371. Because of the enormous economies of scale and density that characterize some or all of the components of local telephone networks and the "prohibitive capital investment" that would be required to duplicate them, local telephone service historically was found to be a natural monopoly. See *United States* v. *Western Elec. Co.*, 673 F. Supp. 525, 538 (D.D.C. 1987), *aff'd in part, rev'd in part*, 900 F.2d 283 (D.C. Cir. 1990).

The 1996 Act was passed because "[t]echnological advances" had "made competition among multiple providers of local service seem possible." *AT&T* v. *Iowa Utils. Bd.*, 525 U.S. at 371. Congress thus ended the "longstanding regime of state-sanctioned monopolies" and established a new set of

federal obligations to "bring [the states] to heel" and "fundamentally restructure[] local telephone markets." *Id.* at 371, 378-79 n.6. Central to that "restructuring" are provisions that require incumbent LECs to provide new entrants with rights to "share" their networks in three ways. See *id.* at 371.

First, §§ 251(c)(2) and 252(d)(1) require incumbent LECs to allow competitors who construct their own facilities to "interconnect[]" their networks with those of the incumbents at cost-based rates. 47 U.S.C. §§ 251(c)(2), 252(d)(1). Interconnection is necessary to allow the competitor's customers to place calls to, and receive calls from, the incumbent's customers, and the incumbent (and new entrants) are required to "transport and terminat[e]" calls placed to their customers from those of competing carriers. *Id.* § 251(b)(5).

Second, §§ 251(c)(3) and 252(d)(1) require the incumbent LEC to provide non-discriminatory access to its "network elements" on an unbundled basis at cost-based rates and on terms and conditions "that are just, reasonable, and non-discriminatory." *Id.* §§ 251(c)(3), 252(d)(1). Because new entrants are entitled to use these leased facilities to offer "a[ny] telecommunications service," these provisions, too, allow new entrants to offer all the local and other services that the facilities can provide.

Third, §§ 251(c)(4) and 252(d)(3) require the incumbent LEC to offer each of its retail services at "wholesale rates" to competitors to resell. These "wholesale rates" are computed by subtracting from the incumbent's retail rates "any marketing, billing, collection, and other [retail] costs that will be avoided by the [LEC]" when it acts as a wholesaler. *Id.* § 252(d)(3); see also *id.* § 251(c)(4).

Congress also enacted provisions designed to assure the rapid implementation of these new duties. Section 251(d)(1) required the FCC to adopt regulations to implement these requirements by August 8, 1996. Section 252 further establishes a procedure and strict time deadline through which new

entrants may obtain the binding arrangements that provide them with the services and facilities to which they are entitled. See *AT&T* v. *Iowa Utils. Bd.*, 525 U.S. at 371-73.

The FCC "anticipate[d] that some new entrants w[ould] follow multiple paths of entry as market conditions and access to capital permit," and therefore sought to "establish rules that will ensure that all pro-competitive entry strategies may be explored." *Local Competition*, 11 FCC Rcd. 15499, 15509 (¶ 12) (1996). AT&T, for example, is simultaneously pursuing all three vehicles. It has invested enormous sums in acquiring and upgrading cable facilities that it will use to provide telephony and other services, and in those geographical areas AT&T generally needs only interconnection from the incumbent LECs. In several other areas, where AT&T has no cable facilities, it is providing competing local service through a combination of leased network elements and resale.

2. The FCC adopted its local competition rules on August 8, 1996. Four aspects are pertinent.

First, to implement the Act's requirement that prices for interconnection and network elements be "based on the cost . . . of providing the interconnection or network element," 47 U.S.C. § 252(d)(1)(A)(i), the FCC adopted a well-established Long Run Incremental Cost method that was supported by "[t]he substantial weight of economic commentary in the record." App. 114a. This "TELRIC" methodology bases prices on the costs that an efficient carrier would incur today in constructing and operating a local telephone network that performs the same functions as the LEC's. The FCC found that this represents the "economic cost" that the LEC in fact incurs in providing network elements and interconnections, and the FCC determined that LECs would be engaged in price squeezes and other "anticompetitive behavior" if they could require competitors to pay higher rates. App. 96a-97a. Conversely, the FCC rejected the LECs' proposal that prices instead be set based on their "historical" or "embedded" book costs. App. 100a, 113a-117a.

Second, the FCC also adopted rules to carry out the provisions of § 251(f)(1). It permits a state commission to exempt any "rural telephone company"[2] from the duties imposed by § 251(c) if the commission finds that compliance with those duties would, among other things, be "unduly economically burdensome." 47 U.S.C. § 251(f)(1). The FCC concluded that a rural telephone company cannot obtain an exemption based on "the economic burden [that is] typically associated with efficient competitive entry," but must show that implementing the Act's requirements would be unduly burdensome, irrespective of revenue losses to competitors. App. 193a; 47 C.F.R. § 51.405(c), (d).

Third, the FCC adopted rules to implement the "avoided cost" standard for resale pricing. This rule requires the exclusion of all retail and other costs that "reasonably [can be] avoid[ed]" by the incumbent LEC when it acts as a wholesaler. App. 168a; 47 C.F.R. § 51.609(b).

Finally, to implement the nondiscrimination requirements of § 251(c)(3), the FCC adopted Rule 315 (47 C.F.R. § 51.315), which allows new entrants to obtain the LECs' loops, switches and other network elements in combined form, rather than obtaining them piecemeal. Rule 315(b) prohibits LECs from separating network elements that they "currently combine[]," and Rule 315(c) provides that incumbent LECs also must (for appropriate compensation) combine elements that are not "ordinarily combined" if so requested by competing carriers. App. 195a-196a. The FCC found that there are "practical difficulties [in] requiring requesting carriers to combine elements that are part of the incumbent LEC's network" which "in practice" make it "impossible" for the competing carrier to do so without the incumbent's assistance. App. 42a-43a. This rule thus prevents LECs from

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[2] The Act defines a "rural telephone company" as a LEC that serves fewer than 100,000 customers or that satisfies other specific criteria. *See* 47 U.S.C. § 153(37).

engaging in discriminatory and anticompetitive conduct that unreasonably raises their rivals' costs.

3. In its first *Iowa Utilities Board* decision, the Eighth Circuit invalidated each of these rules. It rejected the claims that § 201(b) gave the FCC broad rulemaking authority over all the Act's new provisions and invalidated the FCC's pricing and rural exemption rules on jurisdictional grounds. *Iowa Utils. Bd.* v. *FCC*, 120 F.3d 753, 793-800, 801-03 (8th Cir. 1997). The Eighth Circuit also invalidated Rule 315 in its entirety on the ground that the Act "unambiguously" requires LECs to provide network elements that are physically separated from one another and mandates that new entrants perform any combining. *Id.* at 813.

This Court reversed the Eighth Circuit's jurisdictional holding. *AT&T* v. *Iowa Utils. Bd.*, 525 U.S. at 377-85. It also reversed the Eighth Circuit's substantive holding on Rule 315(b), without expressly addressing the other subsections of Rule 315 that the Eighth Circuit had invalidated. The Court held that the Act "does not say, or even remotely imply, that elements *must* be provided in [piecemeal] fashion and never in combined form." *Id.* at 393-95.

4. On remand, the Eighth Circuit invalidated these rules once again. App. 1a-38a.

First, while the Eighth Circuit upheld the FCC's adoption of a forward-looking cost standard to price network elements and interconnections, the court invalidated the subsection of the FCC's TELRIC rule that provided that forward-looking determinations are to be based on the most efficient technology and network configurations. The Eighth Circuit noted that § 252(d)(1) mandates that rates are to be "based on the cost . . . of providing *the* interconnection or network element," and it held that Congress's use of the article "the" meant that determinations must be based on the "cost of providing the actual facilities and equipment that will be used by the competitor" and not some "state of the art technology . . .

neither deployed by the ILEC nor to be used by the competitor." App. 5a. The Eighth Circuit did not address the FCC's determination that TELRIC determines the economic costs that the ILEC in fact incurs in providing its facilities. The Eighth Circuit stayed this decision pending this Court's decision on the petitions for certiorari of the FCC, AT&T, and other private parties.

Second, the Eighth Circuit invalidated the FCC's rule that determines the conditions under which state commissions can exempt "rural LECs" from any or all of the requirements of the Act. App. 25a-32a. Most pertinently, the Eighth Circuit held that the FCC's rule violated the "policy" of § 251(f) of the Act by providing that a determination that compliance with the Act is "*unduly* economically burdensome" could not be based on the losses the rural LEC would incur as a result of efficient competition, but must focus only on economic burdens unique to rural LECs. App. 28a, 193a.

Third, the Eighth Circuit held that the FCC's resale pricing rule violated "[t]he plain meaning of the statute." App. 17a. It held that the Act excludes from the resale price only those costs that the LEC chooses to "actually avoid," rather than those it reasonably would avoid when acting as a wholesaler. App. 17a-18a.

Fourth, the Eighth Circuit held again that Rules 315(c)-(f) "violate the plain language of the statute," and stated that it did not "agree with the Ninth Circuit that the Supreme Court's opinion [had] undermined our rationale for invalidating" those rules. App. 24a-25a.

In addition to these four rulings, the Eighth Circuit also again invalidated several other FCC regulations (proxy prices, superior quality interconnection, superior quality access to network elements, and preexisting agreements). App. 18a-21a, 22a-23a, 32a-37a. While these holdings, too, are erroneous, experience has shown that these rules have little practical importance, and AT&T is not seeking review of

them. By contrast, the four issues that AT&T raises are critical to the implementation of the Act.

REASONS FOR ISSUING THE WRIT

In granting certiorari in the first *Iowa Utilities Board* case, the Court recognized the profound national importance of any decisions to invalidate the fundamental FCC rules that implement the 1996 Act. Because it seeks rapidly to introduce competition with local telephone monopolies that have existed for a century, the 1996 Act "profoundly affects a crucial segment of the economy worth tens of billions of dollars." *AT&T* v. *Iowa Utils. Bd.*, 525 U.S. at 397. Further, the FCC's rules otherwise had a tremendous national impact. They fixed the meaning of the Act in state commission and federal district court proceedings occurring in all 50 states, and eliminated the need for the Act's fundamental requirements to be litigated, *de novo*, in all these proceedings. *Id.* at 378-79 n.6.

In *Iowa Utilities Board*, the Court rejected the Eighth Circuit's jurisdictional claims and held that § 201(b) of the Act gives the Court general rulemaking authority over all the provisions enacted by the 1996 Act. 525 U.S. at 377-78. Such rules must be upheld if they reasonably implement the Act's requirements and are not "inconsistent" with any of its provisions. 47 U.S.C. § 201(b); see also 47 U.S.C. §§ 154(i), 303(r); *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 178, 180-81 (1968). In this regard, this Court observed that the 1996 Act is "a model of ambiguity," *AT&T* v. *Iowa Utils. Bd.*, 525 U.S. at 397, and it specifically rejected the Eighth Circuit's interpretation of the "plain meaning" of one of the Act's provisions (§ 251(c)(3)). *Id.* at 393-95.

Yet on remand, the Eighth Circuit has vacated on the merits the same pricing and rural exemption rules that it previously held to be outside the FCC's jurisdiction. And the Eighth Circuit refused to reinstate the other subsections of the FCC

rule that the Court specifically reinstated. In each case, the Eighth Circuit held that the FCC rules violated a putative "plain meaning" or "underlying policy of the Act" that the court discerned. Each ruling epitomizes improper failures to defer to reasonable agency interpretations, and each would defeat or profoundly impair the implementation of landmark federal legislation nearly five years after it was enacted.

I. THE EIGHTH CIRCUIT'S INVALIDATION OF THE FCC'S RULE FOR SETTING NETWORK ELEMENT PRICES WAS BASED ON AN ERRONEOUS INTERPRETATION OF THE ACT, IGNORES THE FCC'S OWN FINDINGS, CONFLICTS WITH THE DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS AND WOULD PROFOUNDLY IMPAIR THE ACT'S IMPLEMENTATION.

First, review of the Eighth Circuit's decision to invalidate a subsection of the FCC's TELRIC regulation is both manifestly appropriate and a matter of the greatest national importance. Foremost, the Eighth Circuit's decision is clearly wrong. It conflicts not only with the decisions of this Court, but also with the decisions of other courts of appeals that construed other regulatory statutes that are identical in all relevant respects. Moreover, unless reversed, the Eighth Circuit's decision can have a devastating effect on the achievement of the objectives of the 1996 Act, and could require new entrants, state commissions, and the FCC to incur, for a second time, the extraordinary investments that they made to implement TELRIC.

1. The Eighth Circuit decision squarely conflicts with the decisions of this Court and of other courts of appeals. Indeed, the Eighth Circuit's decision to invalidate one subsection of TELRIC conflicts with its decision to reject the LECs' claims that the Act requires a "historic cost" method and to uphold the rest of the regulation.

The FCC's regulation implements the provisions of § 252(d)(1) of the Act. It provides that ILECs' rates for network elements and interconnections are to be "'based on the costs . . . of providing the interconnection or network element.'" *Local Competition*, 11 FCC Rcd. at 15882 (¶ 764) (omission in original). The "costs of providing" a network element today manifestly are not the "historic" book costs that LECs incurred when they purchased the underlying facility in the distant or more recent past. The Eighth Circuit held the term "cost" is "ambiguous," and that the FCC reasonably read the term "cost" to refer to forward-looking (*i.e.* replacement) cost. The Eighth Circuit recognized that "'[i]t is current and anticipated cost, rather than historical cost that is relevant to business decisions to enter markets,'" and it held that the FCC thus reasonably concluded that "forward looking costs would best ensure efficient investment decisions and competitive entry." App. 10a-11a.

Yet despite upholding the use of forward-looking cost, the Eighth Circuit held that the Act prohibited the FCC from mandating that these forward-looking determinations be made based on the most efficient technology that is generally available and the most efficient configurations of this technology. Because the rates are to reflect the costs of providing "the" network element, the Eighth Circuit concluded that the cost determination had to be based on the "cost of providing the actual facilities and equipment that will be used by the competitor" and not "hypothetical" and "ideally configured" facilities that are "neither deployed by the ILEC nor to be used by the competitor." App. 8a-9a. The Eighth Circuit stated that "[t]his does not defeat the purpose of using a forward-looking methodology," for "[c]osts can be forward-looking in that they can be calculated to reflect what it will cost the ILEC in the future to furnish to the competitor those portions or capacities of the ILEC's facilities and equipment that the competitor will use." *Id.* at 8a.

The Eighth Circuit's holding was error, for three related reasons. First, the Eighth Circuit ignored the FCC's finding that the efficient replacement costs of the LECs' facilities are the basis for measuring the costs that the LECs in fact incur in providing their existing actual facilities to a competitor today. App. 60a-61a, 66a-67a, 96a-104a. As the FCC explained and as the economic testimony overwhelmingly confirmed, the economic cost of using a facility today is measured by the costs of replacing it with an equally efficient substitute. If a computer cost $1000 in 1998 and a comparable computer costs $750 today, the cost to the LEC of providing its "actual" 1998 computer to a competitor today is $750, for that is the maximum price that the LEC could receive from the sale of the computer.

Second, while the Eighth Circuit was correct that the statute refers to the LECs' actual facilities, no one disputed that fact. The question was and is what are the "costs" that the LEC incurs in "providing" its "actual" facilities. By holding that the term "cost" is ambiguous and can mean replacement cost, the Eighth Circuit's own reasoning established the validity of TELRIC.

Third, the Eighth Circuit entirely missed the point when it condemned TELRIC on the ground that it is "hypothetical." All cost of service ratemaking (including embedded historic cost) is hypothetical.[3] Indeed, it is because of the hypothet-

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[3] For example, a ratemaking methodology based on historical costs, which the incumbent LECs unsuccessfully advocated, asks not what the firm actually paid for all its assets, but what it would have paid if only prudent investments, or only investments that are today "used and useful," had been made. Such a methodology asks whether the firm's investments are the ones that "reasonable utility management . . . would have made, in good faith, under the same circumstances, and at the relevant point in time," *City of New Orleans* v. *FERC*, 67 F.3d 947, 954 (D.C. Cir. 1995), and, where imprudence is found, can require highly detailed analysis of what costs the utility would have occurred in the hypothetical world in which it acted prudently. It is thus no more "hypothetical" to focus on

ical nature of cost-based ratemaking that courts have held that the term "'cost' is a chameleon, capable of taking on different meanings, and shades of meaning." *Strickland* v. *Commissioner, Maine Dep't of Human Servs.*, 48 F.3d 12, 19 (1st Cir. 1995). And all cost of service ratemaking is designed to measure the "costs" of "the" actual facilities or services of a regulated firm.

For these reasons, the Eighth Circuit's decision conflicts sharply with this Court's decision in *Chevron* and its progeny. Indeed, it is difficult to imagine statutory terms that are *less* susceptible to a claim of "plain meaning" than the phrase "cost . . . of providing the interconnection or network element." It is similarly difficult to imagine a phrase whose usage is more universally understood to delegate to the administrative agency, within the bounds of reasoned decisionmaking established by the APA, the broadest interpretive authority. The Eighth Circuit's conclusion that the terms of § 252(d)(1) precluded the FCC from employing a well-accepted replacement cost methodology cannot remotely be reconciled with the deferential standard of review that this Court has held applies to agency interpretations of ambiguous statutes.

The Eighth Circuit's decision likewise conflicts with decisions of other courts of appeals. In *Potomac Electric Power Co.* v. *ICC*, 744 F.2d 185 (D.C. Cir. 1984), for example, the D.C. Circuit upheld the Interstate Commerce Commission's implementation of pricing requirements for rail carriers under the Staggers Rail Act, which likewise required a focus on "costs." See Pub. L. No. 96-448, sec. 201, § 10701a, 94 Stat. 1895, 1898-900 (1980). In contrast to the Eighth Circuit's rejection of ratemaking methodologies based on efficient alternatives, the D.C. Circuit concluded that the ICC's methodology, which "deals with hypothetical and not actual trans-

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today's more efficient alternatives than to look at yesterday's prudent ones.

portation situations, . . . provides an appropriate analytical tool." *Potomac*, 744 F.2d at 193-94; see also *Burlington N. R.R.* v. *Surface Transp. Bd.*, 114 F.3d 206, 213 (D.C. Cir. 1997) (upholding application of methodology based on costs that would be incurred by a hypothetical railroad). The Third Circuit, too, has upheld this methodology. *Consolidated Rail Corp.* v. *United States*, 812 F.2d 1444, 1457 (3d Cir. 1987).

The Eighth Circuit's decision also conflicts with the decision of the Fifth Circuit in *Texas Office of Public Utility Counsel* v. *FCC*, 183 F.3d 393, 410-13 (5th Cir. 1999), on which certiorari has been granted, see *GTE Service Corp.* v. *FCC*, 120 S. Ct. 2214 (2000). That case involves the new "universal service" system established by the 1996 Act, see 47 U.S.C. § 254, which likewise requires the FCC to make determinations of carriers' costs of service (although "cost" is not a term used in § 254). There, the Fifth Circuit upheld the FCC's decision to use the same forward-looking TELRIC methodology for universal service that it required for pricing interconnection and network elements. The FCC determined to use the same methodology in part in order to "diminish arbitrage opportunities that might arise from inconsistencies between the methodologies for setting unbundled network element prices and for determining universal service support levels." *Universal Service*, 12 FCC Rcd. 8776, 8916 (¶ 251) (1997); see also *id.* at 8889-90, 8911-12 (¶¶ 205-206, 247). The circuit conflict over the permissibility of the methodology frustrates that objective.

2. Moreover, even apart from these conflicts, the Eighth Circuit's decision (if left unreviewed) will introduce an extended period of debilitating uncertainty into telecommunications markets, and ensure years more litigation over the proper pricing methodology under the Act. AT&T believes the ultimate effect of the Eighth Circuit decision should be, if anything, to lower network element rates. That is because the forward-looking cost of the incumbent LECs' "existing facilities" (what the Eighth Circuit has said must be measured)

will never be higher, but will often be lower, than the cost of the most efficient available alternatives (what TELRIC measures). To return to the example of the computer, see *supra* p. 12, when a $750 computer hits the market, the comparable computer that cost $1000 two years ago will not be able to be sold for more than $750, but might well have to be sold for less. By contrast, at least one incumbent LEC has asserted that the Eighth Circuit's decision requires that network element prices be set at or close to the LECs' "historical costs,"[4] and another appears to believe that it requires a calculation of the cost of actually reproducing the identical facilities the LECs now use, no matter how obsolete.[5]

These initial disputes foreshadow a lengthy and time-consuming litigation process that would severely disrupt the industry, require new federal and state proceedings, impose immense burdens on state regulatory commissions and private parties, and further substantially delay and discourage competitive entry into monopoly local telephone markets. Absent review now by this Court, the entire pricing structure under the Act would have to be reexamined. Extensive proceedings would have to occur at the FCC to determine what the new binding federal pricing rules will be, and those rules will then be subject to further appellate challenge in the Eighth Circuit. Prior to adoption of those rules, each state commission arbitrating interconnection agreements would have to undertake the same task, again subject to further review and revision on appeal. The result would be that, nearly five years after passage of the 1996 Act, the most basic methodological questions about its implementation will remain unsettled for an additional, considerable period of

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[4] *See* Opposition of Qwest Corporation to Motion for Partial Stay of the Mandate at 3 n.3, *Iowa Utils. Bd.* v. *FCC*, No. 96-3321 (8th Cir. filed Sept. 11, 2000).

[5] *See* Brief of Petitioner GTE at 41-43, *GTE Serv. Corp.* v. *FCC*, No. 99-1244 (U.S. filed Aug. 14, 2000).

time. And during this period, entrants will have to develop and litigate the appropriateness of new models to implement the new interpretation of the Act.

That scenario is directly contrary to the statutory scheme, which was designed to achieve Congress' paramount objective of rapid and broad-scale competitive entry. The 1996 Act imposed an extraordinary, 6-month deadline on the FCC to adopt rules immediately after its February 1996 enactment, 47 U.S.C. § 251(d)(1), and imposed similarly demanding arbitration deadlines so that states would quickly apply those rules to create binding interconnection agreements, *id.* § 252(b). Congress recognized that prolonged uncertainty over the fundamental regulatory principles that would govern the transition to competitive markets would significantly impair the competitive efforts it sought to promote. The Court should grant certiorari to remove the significant and unjustified uncertainty over those principles that the Eighth Circuit has again introduced.

II. THE EIGHTH CIRCUIT'S INVALIDATION OF FCC RULE 405 IS CONTRARY TO THE TERMS AND PURPOSES OF THE 1996 ACT, AND WILL IMPROPERLY INSULATE THE NATION'S RURAL AREAS FROM THE OPERATION OF THE ACT AND FROM THE BENEFITS OF COMPETITION.

The Eighth Circuit's invalidation of Rule 405 likewise presents an issue of immediate and pressing importance. This rule governs the conditions in which exemptions can be granted or maintained for "rural telephone companies," which are companies serving less than 100,000 customers or satisfying other criteria. 47 U.S.C. § 153(37). The Eighth Circuit has held that these incumbent monopolies can be exempted from the network-sharing obligations of § 251(c) of the Act simply because they would suffer economic losses as a result of the efficient competitive entry that compliance with those obligations would make possible. Nothing in the statutory

language supports, much less compels, that result, and it is flatly contrary to the Act's purposes. The Eighth Circuit's erroneous holding on this issue will have the effect of broadly exempting incumbent monopoly rural telephone companies from the market-opening requirements of § 251(c) of the Act.

Section 251(f) of the Act exempts rural telephone companies from the requirements of § 251(c) of the Act *until* they receive a request for interconnection, services, or network elements from a potential competitor. Once they receive such a request, that exemption must be terminated if the relevant state commission determines that the request "is not unduly economically burdensome, is technically feasible, and is consistent with [the Act's universal service provisions]." *Id.* § 251(f)(1)(A). The FCC's rules require the rural LEC to show that applying Section 251(c) to it would impose an economic burden "beyond the economic burden that is typically associated with efficient competitive entry." 47 C.F.R. § 51.405(c).

That rule was patently reasonable, and there was no colorable basis for the Eighth Circuit to vacate it. The term "undue" is not defined by the Act, and must be given content. The FCC did so by concluding that "Congress did not intend [in § 251(f)] to insulate smaller or rural LECs from competition, and thereby prevent subscribers in those communities from obtaining the benefits of competitive local exchange service." App. 193a. Rather, it merely sought to provide some relief in those circumstances in which smaller carriers would suffer substantial burdens from complying with the generally applicable requirements *beyond* those that naturally come from competition itself.

That conclusion was a plainly permissible interpretation of an ambiguous statutory term, and should easily have been upheld under *Chevron*. Indeed, it was the most natural reading of the Act. Competition will always impose some economic burden on a firm that previously had been a monopoly, because that firm will lose some market share and

some revenues as a result. The FCC properly concluded that Congress was not seeking to insulate rural monopoly LECs from competition generally or from the burden competition will inherently impose, but instead to create a limited exemption for those instances in which a particular rural LEC would suffer a special and more severe degree of burden specific to its circumstances. By contrast, because all monopoly enterprises will suffer some economic losses from competitive entry, permitting that inherent burden itself to be deemed "undue" could make the exemption both automatic and permanent.

The Eighth Circuit nonetheless determined that it "owe[d] no deference" to the FCC's interpretation because that interpretation would "frustrate" the putative "congressional policy" to "protect rural telephone companies." App. 28a. To support the assertion that this was Congress' policy, the Eighth Circuit cited a handful of congressional floor statements. *Id.* at 28a-29a. But the best indication of Congressional policy is the language of the statute Congress enacts, and § 251(f) clearly gives only limited, not blanket, "protect[ion]" to rural companies. That is why exemptions are limited only to circumstances of "undu[e]" economic burden. Indeed, the legislative history repeatedly confirms that Congress intended the Act to bring competition to rural territories as well as to the rest of the nation and did not enact "protections against competition" in rural areas.[6]

The Eighth Circuit also suggested that its holding would not lead to "automatic" rural exemptions because, it noted, state commissions would take into account that competitors

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[6] *See, e.g.*, 141 Cong. Rec. S8004 (daily ed. June 8, 1995) (statement of Sen. Dorgan) (Act ensures that rural America does not have "protections against competition," and will "make sure we have the same benefits and opportunities in rural America for the build-out of the infrastructure of this telecommunications revolution"); S. Rep. No. 104-23, at 61 (additional views of Senator Burns) (objective is to "expand[] the competitive choices available to all Americans, including rural and small town residents").

using rural LEC facilities would compensate rural LECs for their use. App. 30a. But those payments are compensation for the use of the rural LECs' facilities and services, not for the accompanying loss of customers and revenues that competition brings. If competitors also had to make the rural LEC whole for its loss of customers, no new entrant would ever be able to compete profitably with it.

In this regard the Eighth Circuit's analysis had things exactly backwards. In those situations in which the burden imposed on the rural LEC of sharing its network will be the smallest – such as when the competitor has its own facilities, and needs only interconnection from the rural LEC – the competitor will be paying the rural LEC only very small amounts. But under the Eighth Circuit's decision, those are also the situations in which the incumbent LEC will perversely be most entitled to the exemption, because it will be those situations in which the rural LEC is losing customers to competition while receiving the least compensation from competitors. By permitting States to treat the burden of losing customers to competition as itself "unduly economically burdensome," the Eighth Circuit's holding will foreclose competitive entry in precisely the circumstances in which the actual burden on the LEC of complying the Act will be the most trivial.

The Eighth Circuit likewise erred when it vacated the aspect of Rule 405 that placed the burden on the rural LEC to demonstrate its entitlement to a continued exemption. App. 32a. Section 251(f)(1) is silent on the question of which party in contested exemption proceedings bears the burden of proof. In the face of this statutory silence, the FCC reasonably determined that the rural LEC should bear the burden because the rural LEC, not its competitors, is in possession of the information necessary to determine whether a request for interconnection, services, or network elements (i) is "technically feasible" given the architecture of the rural LEC's network, (ii) would be "unduly economically burden-

some" to it, and (iii) is "consistent" with the universal service provisions of the Act given the costs and demands of universal service in the area. *Id.* at 31a-32a. Indeed, given the degree to which those issues turn on the engineering and financial condition of the rural LEC's network and operations, it makes absolutely no sense to impose upon the competitive carrier the burden of somehow proving the opposite.[7]

The resolution of these issues will determine whether the fruits of competition will be shared throughout the nation. Congress recognized that competitive entry would not be feasible and would not occur unless incumbent LECs were obliged to share their network facilities and services with new entrants. The duties imposed on incumbent LECs under § 251(c) are thus of "[f]oremost" importance. *AT&T* v. *Iowa Utils. Bd.*, 525 U.S. at 371. The Eighth Circuit's rulings can result in broad-scale exemptions of rural monopoly LECs from all of those duties, and foreclose competitive entry that would otherwise occur.

AT&T, for example, has acquired cable television systems in rural as well as urban areas throughout the nation, and is upgrading those facilities so that those same wires can be used to provide not only video programming, but also local and long-distance telephony and high-speed Internet access in competition with the incumbent LECs. Those facilities are poised to provide the first-ever competitive choice to customers in rural areas within States like Pennsylvania, Ohio, Washington, West Virginia, and New Hampshire, areas

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[7] The Eighth Circuit's contrary conclusion reasoned that because the issue in an exemption proceeding is whether an existing exemption should be "terminated" rather than whether one should be "granted," the "plain meaning of the statute" required the burden to be imposed on the competitor. App. 32a. That was a *non sequitur*. Regardless of whether an exemption is being granted for the first time or being continued, the burden could be placed on either side, and there is nothing illogical about a party have to prove its continued entitlement to a legal privilege once that entitlement is challenged.

currently served by over 20 monopoly rural LECs. Because AT&T will provide these services over its own facilities, it does not need network elements or services for resale from these incumbent rural LECs. It does, however, have a critical need for basic cost-based interconnection under § 251(c)(2), so that its customers can place calls to, and receive calls from, the customers of the rural LECs serving the same areas.

But rural LECs have absolutely no incentive to facilitate competitive entry – and every incentive to prevent it. As a consequence, if those LECs are exempt from § 251(c), they will certainly seek to charge monopoly, competition-foreclosing rates for that most fundamental of services. Unless reversed, the Eighth Circuit's decision will thus have the effect of frustrating competitive entry, by AT&T and others, that would otherwise occur in rural areas throughout the nation. That would maintain in those areas the monopolies that the 1996 Act was adopted to dismantle.[8]

III. THE EIGHTH CIRCUIT'S INVALIDATION OF THE FCC'S RESALE PRICING RULE WILL RENDER RESALE UNECONOMIC BY INFLATING COMPETITIVE CARRIERS' COSTS AND REQUIRING THEM TO SUBSIDIZE THE INCUMBENTS' RETAIL OPERATIONS.

The Act provides that the wholesale price for services purchased for resale shall be calculated by taking the incumbent LEC's retail rates and "excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided" by the incumbent LEC when it acts as a wholesaler. 47 U.S.C. § 252(d)(3). The FCC

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[8] The Eighth Circuit also invalidated Rule 405(c) on an additional ground: it believed the rules terms could have led state commissions to ignore two of three statutory criteria for determining the exemption. App. 26a-27a. That holding was both incorrect and inconsequential. As the FCC has held and as it explained below, the rule does not eliminate the two statutory criteria, and no FCC rule could do so. App. 27a.

found that the "costs" that will be avoided when a LEC provides wholesale services for resale "includes all the costs that the LEC incurs in maintaining a retail, as opposed to a wholesale, business." App. 168a. The FCC regulation thus directed the exclusion of not only advertising, sales, customer care, and other such obvious retail costs, 47 C.F.R. § 51.609(c), but also of any other costs that "reasonably can be avoided" when a LEC provides its "service[s] for resale at wholesale rates." *Id.* § 51.609(b).

The Eighth Circuit invalidated this rule on the ground that "the plain meaning of the statute" required the FCC to define excludable costs as those retail costs that the LEC "will actually" avoid, rather than those that "reasonably can be avoided." App. 32a. The Eighth Circuit concluded that it was improper to treat "the ILEC as if it were strictly a wholesaler," for the "ILEC will itself remain a retailer of telephone service with its own continuing costs of providing that retail telephone service." *Id.* at 18a. In the Eighth Circuit's view, to the extent the ILEC's retail costs were not in fact declining as a result of offering wholesale services, it is entitled to recover its retail costs in the wholesale rates it charges its retail competitors.

This holding is flatly wrong. Under it, new entrants that attempt to compete with incumbent monopolists are required not only to incur their own advertising, sales, customer service, and other retail costs, but also to pay a portion of the retail costs of the incumbent LEC with whom they are competing. That is contrary to the terms, structure, and manifest purpose of the Act. In all events, the FCC's interpretation is reasonable and entitled to deference under *Chevron*.

The obvious import of § 252(d)(4)'s terms is that wholesale rates must exclude "any marketing, billing, collection, and other [retail] costs that will be avoided by the local exchange carrier" *when it acts as a wholesaler*. Otherwise, the wholesale rates that would be set would include costs that the LEC does not incur in offering its wholesale services for resale,

and new entrants would be subsidizing the retail operations of its own monopoly competitor. That is antithetical to the design of the Act.

Under the Act's approach, both the incumbent LEC and its competitors incur the same "wholesale" cost for the service, and will then be able to compete over who can perform the retail functions most efficiently and at the lowest cost. See *AT&T* v. *Iowa Utils. Bd.*, 525 U.S. at 429 ("It is in the *un*shared, not in the shared, portions of the enterprise that meaningful competition would likely emerge") (Breyer, J., concurring in part and dissenting in part). If, by contrast, competitors had to pay 100% of their own retail costs *plus* some portion of the incumbent's retail costs, there is no prospect that they could successfully compete.

Nor is there any validity to the Eighth Circuit's concern that "[t]he FCC's rule treats the ILEC as if it were strictly a wholesaler" when in fact "the ILEC will itself remain a retailer of telephone service with its own continuing costs of providing that retail telephone service." App. 18a. The fact that the incumbent LEC continues to incur retailing costs itself is irrelevant; those costs are not caused by its wholesale transactions with new entrants, and the LECs "will avoid" these retail costs whenever it provides service at wholesale. If some portion of the incumbents' retailing costs were included within the resale price, then new entrants will be forced partially to subsidize the retailing costs of their incumbent competitors – precisely the situation that Congress sought to prevent, and that would make resale competition economically infeasible.[9]

Although resale does not enable the competitor to differentiate its service from that of the incumbent LEC or to

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[9] Indeed, the LECs have claimed that the methodology endorsed by the Eighth Circuit will reduce the "resale discount" by two-thirds, from an average of over 20% to 7%. *See, e.g.*, Complaint, ¶ 71, *GTE South, Inc.* v. *Morrison*, No. 3:97CV493 (E.D.Va. filed June 30, 1997).

offer the full range of local services, resale is "an important entry strategy for many new entrants, especially in the short term when they are building their own facilities." App. 165a. AT&T, for, example, has plans to use resale in precisely this transitional way, to provide service seamlessly to large numbers of customers while it completes the often protracted process of making arrangements to lease unbundled network elements or to move those customers' traffic onto AT&T's own facilities. Congress intended that resale be available as a competitive tool for these and other purposes, and the Eighth Circuit's decision has created a pricing formula that will foreclose its use. This Court should therefore grant certiorari in order to restore resale as an entry vehicle under the Act.

IV. THE EIGHTH CIRCUIT'S HOLDING ON NETWORK ELEMENT COMBINATIONS CREATES AN ACKNOWLEDGED CONFLICT WITH THE NINTH CIRCUIT ON AN ISSUE OF NATIONAL IMPORTANCE.

Because of the time, expense, and infeasibility of constructing full alternative telephone networks throughout the nation, Congress' goal of creating immediate and nationwide competitive alternatives to the services of the incumbent LECs depends critically on § 251(c)(3) of the Act. It requires incumbent LECs to offer competing carriers nondiscriminatory access to their "network elements" on an "unbundled" basis on rates, terms and conditions that are "just, reasonable, and nondiscriminatory." 47 U.S.C. § 251(c)(3). Because there are many instances in which competing carriers using network elements need more than just a single element, network elements are commonly ordered in combinations. Yet for a second time, the Eighth Circuit has invalidated important network element combination rules adopted by the FCC. It did so this second time, moreover, despite this Court's decisive rejection in *Iowa Utilities Board* of the reasoning on which it relied – and despite the fact that its holding creates a direct conflict with the Court of Appeals

for the Ninth Circuit, which properly applied this Court's decision in *Iowa Utilities Board* to reach the opposite result.

FCC Rules 315(b)-(f), 47 C.F.R. § 51.315(b)-(f), address the incumbent LECs' responsibilities to provide combinations of network elements. Rule 315(b) addresses network elements that the LEC "currently combines" for itself, and prohibits the incumbent from providing such elements to competitors in piecemeal or "separate[d]" form, as opposed to combined form (unless the competitor so requests). *Id.* § 51.315(b). Rule 315(c), in contrast, addresses LECs' responsibilities to perform the functions necessary to create new combinations of their network elements. It provides that, if certain technical requirements are met, then "[u]pon request, an incumbent LEC shall perform the functions necessary to combine unbundled network elements in any manner, even if those elements are not ordinarily combined in the incumbent LECs' network." *Id.* § 51.315(c).[10]

In its original *Iowa Utilities Board* decision, the Eighth Circuit invalidated all of these rules. Its holdings were based on its constructions of two portions of § 251(c)(3). First, the Eighth Circuit construed the term "unbundled" in the first sentence of § 251(c)(3) to mean "uncombined," and therefore held that "Section 251(c)(3) requires an incumbent LEC to provide access to the elements of its network only on an unbundled (as opposed to a combined) basis." *Iowa Utils. Bd.* v. *FCC*, 120 F.3d at 813. Second, it construed the second sentence of § 251(c)(3) – "An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service," 47 U.S.C. § 251(c)(3) – as "unambiguously

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[10] Rules 315(d)-(f) then deal with other aspects of network element combinations, such as the combination of LEC network elements with competitors' network elements, and the assignment of the burden of proof with regard to various technical showings. 47 C.F.R. § 51.315(d)-(f).

indicat[ing] that requesting carriers [will] combine . . . the unbundled elements themselves." *Iowa Utils. Bd.* v. *FCC*, 120 F.3d at 813. The Eighth Circuit held that "this language can[not] be read to levy a duty on the incumbent LECs to do the actual combining of elements." *Id.*

While this Court's decision did not specifically address Rules 315(c)-(f), it rejected each of the statutory interpretations on which the Eighth Circuit had relied to invalidate all the subparts of Rule 315. It held that the term "unbundled" in § 251(c)(3) does not mean "physically separated," but rather means "to give separate prices for equipment and supporting services." *AT&T* v. *Iowa Utils. Bd.*, 525 U.S. at 394. And it held that the statutory language requiring network elements to be provided in a manner that "allows requesting carriers to combine" them "contemplates that elements *may* be requested and provided" in "discrete pieces," but "does not say, or even remotely imply, that elements *must* be provided only in this fashion and never in combined form." *Id.*

Moreover, the Court further held that Rule 315(b) "find[s] its basis in § 251(c)(3)'s nondiscrimination requirement," *id.* at 395, a requirement the Eighth Circuit had not discussed. That requirement prohibits incumbent LECs from imposing terms and conditions on the provision of network elements that cause them to incur greater or "wasteful" costs that the incumbents do not themselves incur. *Id.*

Subsequent to that decision, the Ninth Circuit was called upon to address whether incumbent LECs could be required to provide new combinations to new entrants in reviewing the lawfulness under the Act of an interconnection agreement that included that requirement. See *U S West Communications* v. *MFS Intelnet, Inc.*, 193 F.3d 1112 (9th Cir. 1999), *cert. denied*, 120 S. Ct. 2741 (2000). The Ninth Circuit sustained the lawfulness of the requirement on the basis of this Court's decision in *Iowa Utilities Board*:

> Although the Supreme Court did not directly review the Eighth Circuit's invalidation of § 51.315(c)-(f), its interpretation of 47 U.S.C. § 251(c)(3) demonstrates that the Eighth Circuit erred when it concluded that the regulation was inconsistent with the Act. We must follow the Supreme Court's reading of the Act despite the Eighth Circuit's prior invalidation of the nearly identical FCC regulation.

Id. at 1121. *Accord MCI Telecomms. Corp.* v. *U S West Communications*, 204 F.3d 1262, 1268 (9th Cir. 2000) ("The [Supreme] Court's holding concerning Rule 315(b) . . . confirms that the Eighth Circuit's interpretation of the Act was incorrect" also with respect to Rules 315(c)-(f).), *petition for cert. filed*, 69 U.S.L.W. 3143 (U.S. Aug. 7, 2000) (No. 00-214).

However, on remand, the Eighth Circuit declined to correct its prior holding. Instead, it again held that "Congress has directly spoken on the issue of who shall combine previously uncombined network elements," and again held that "the requesting carriers" must do so. App. 25a. The Eighth Circuit acknowledged the circuit conflict it was thereby creating, but stated that it did not "agree with the Ninth Circuit that the Supreme Court's opinion undermined our rationale for invalidating the additional combinations rule." App. 24a. It therefore refused to alter its holding vacating Rules 315(c)-(f). *Id.*

The Court should grant certiorari to resolve the direct and acknowledged circuit conflict on this recurring issue regarding the interpretation of the Act and the application of its prior decision. Congress contemplated that competitive entry into local telecommunications markets would be governed by "the new *federal* regime . . . to be guided by federal-agency regulations." *AT&T* v. *Iowa Utils. Bd.*, 525 U.S. at 378-79 n.6. A circuit split on an issue as fundamental as this one destroys the national uniformity that Congress sought to establish on the competitive rules of engagement. That uniformity is important both "because many new

entrants seek to enter national or regional markets" and because Congress intended that the benefits of competition would be enjoyed throughout the country. *Local Competition*, 11 FCC Rcd. at 15528 (¶ 55).

In addition, the issue of network element combinations has great practical significance. Network elements are most commonly ordered in some combination, rather than singly, because competing carriers that use them need more than one. As the FCC correctly found, however, there are "practical difficulties [in] requiring requesting carriers to combine elements that are part of the incumbent LEC's network" that "in practice" make it "impossible" for the competing carrier to do so without the incumbent's assistance. App. 42a-43a. The Eighth Circuit's original decision to invalidate Rules 315(c)-(f) was based on its unsupported assumption that incumbent LECs would "allow entrants access to their networks" in order to perform combinations. *Iowa Utils. Bd.* v. *FCC*, 120 F.3d at 813. As the FCC subsequently found, however, "incumbent LECs have refused to provide access to network elements so that competitors could combine them" except in highly limited circumstances. See *Local Competition*, 15 FCC Rcd. 3696, 3910 (¶ 482) (1999).[11] Rule 315(c) thus represents the only practical way for some network element combinations to be obtained at all.

Finally, the Court also should grant certiorari to end the protracted, artificial and wholly unnecessary disputes that the Eighth Circuit's decision has caused, and will continue to cause, over which network element combination scenarios are implicated by various network element requests. The FCC

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[11] Thus, in state arbitrations, for example, Bell Atlantic (now Verizon) has warned against allowing competitors' employees "with wire snips and screwdriver in hand, to work on" its equipment, and BellSouth has termed such access "an unwarranted and illegal intrusion." *See* Joint Brief of Intervenors in Support of FCC at 57-59, *Iowa Utils. Bd.* v. *FCC*, No. 96-3321 (8th Cir. filed Aug. 16, 1999) (citing incumbent LEC submissions).

wrote Rule 315 as it did, with the various subparts, to cover comprehensively all scenarios in which network elements might be used in combinations. It sought to ensure that, regardless of the particular combination scenario involved, there would be a level playing field between incumbents and competing carriers and that discriminatory and anticompetitive practices in providing combinations would be prohibited. The FCC employed a single set of legal and policy rationales in support of all Rule 315's subparts, App. 42a-43a, and the Eighth Circuit, at least in its first opinion, likewise relied on a single analysis to invalidate all the subparts. *Iowa Utils. Bd.* v. *FCC*, 120 F.3d at 813. The artificial distinction the Eighth Circuit has now imposed between, for example, competing carriers' rights with respect to network elements that the incumbent "currently combines," App. 195a (Rule 315(b)), and competing carriers' rights with respect to network elements that are not "ordinarily combined," *id.* at 195a-196a (Rule 315(c)), has, predictably, fostered talmudic disputes over whether various types of network element requests are for combinations that are "new" or "old," or for elements that are "commonly" or "not commonly" combined in the LEC's network, and thus present a "315(b) issue" (in which case the incumbent LEC must provide them in combined form) or a "315(c) issue" (in which case, under the Eighth Circuit's decision, it need not).

And those disputes often occur, as would be expected, where the competitive stakes are the highest. For example, a substantial number of customers now order second lines into their homes – for family members, for home offices, for Internet access, or for other reasons – and any carrier that cannot efficiently provision additional lines will be under a substantial competitive disadvantage. However, sometimes the second local loop will not be hooked up to either the incumbent's switch or the customer's premises until the customer places the second line order. In those circumstances, incumbent LECs have asserted that they have no duty

to "combine" those network elements if the customer orders service from a competing carrier that uses the incumbent's network elements, even though the incumbent routinely combines the very same elements for itself whenever one of its customers places such an order.

The Court should grant certiorari in order to eliminate this unfounded distinction between these rules, resolve the circuit conflict, and permit the FCC to prohibit the anticompetitive conduct it properly sought to address.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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